DJZ

267 NLRB No. 123

D--1087
Honolulu, HI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE O'BRIEN CORPORATION

and

Case 37--CA--1970

UFCW, LOCAL 480, AFL--CIO,
AFFILIATED WITH UNITED FOOD
& COMMERCIAL WORKERS INTER-
NATIONAL UNION, AFL--CIO--CLC

DECISION AND ORDER

Upon a charge filed on 26 October 1982 by UFCW Local 480, AFL--CIO, affiliated with United Food & Commercial Workers International Union, AFL--CIO--CLC, herein called the Union, and duly served on The O'Brien Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint on 30 November 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 22 September 1982, following a Board

election in Case 37--RC--2641, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about 25 October 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 9 December 1982 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 31 March 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 6 April 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an opposition to the Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] Official notice is taken of the record in the representation proceeding, Case 37--RC--2641, as the term ''record'' is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its opposition to the Motion for Summary Judgment, Respondent admits its refusal to bargain but argues that the Union's certification of representative is invalid due to the Board's erroneous conclusion in Case 37--RC--2641 that estimators and salesmen do not share a community of interest with other unit employees, and consequently are to be excluded from the unit found appropriate.

Review of the record herein, including the record in Case 37--RC--2641, reveals that on 10 August 1981, following a hearing on the Union's petition, the Acting Regional Director for Region 20 issued his Decision and Direction of Election in which he deemed appropriate a unit which excluded estimators and salesmen. Respondent's request for review of the Regional Director's Decision and Direction of Election was denied by the Board by mailgram on 3 September 1981 on the grounds that it failed to raise substantial issues warranting review.

An election conducted by secret ballot on 4 September 1981 resulted in four ballots cast for and four ballots cast against the Union, with two challenged ballots. On 10 September 1981 the Union filed timely objections to the conduct of the election and to conduct affecting the results of the election. The Hearing Officer issued his Report on Objections and Challenged Ballots and Recommendations on 22 February 1982 in which he recommended that the challenges be overruled and the ballots counted, that

one of the objections be sustained, and that the election be set aside. No exceptions were taken to the report. The challenged ballots were opened and counted on 19 March 1982 and a revised tally indicated four ballots for and six ballots against the Union.

Pursuant to the Hearing Officer's report, a new election by secret ballot was conducted on 14 September 1982 with the tally showing seven ballots for and five against the Union. There was one challenged ballot, an insufficient number to affect the results of the election. On 22 September 1982 the Acting Regional Director for Region 20 issued a certification of representative.

By letter dated 12 October 1982 the Union requested Respondent to transmit to it certain relevant information to allow it to prepare to negotiate a collective-bargaining agreement.[2] By letter dated 25 October 1982 Respondent informed the Union it would not bargain with it due to its opinion that the certification of representative was improperly issued. By letter dated 16 November 1982 Respondent also informed the Officer-in-Charge of the Board's Subregion 37 that it had refused to bargain with the Union because the Regional Director had erred in excluding sales personnel from the bargaining unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section

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[2] This request has been construed as a general request to bargain. The complaint so alleges and Respondent's answer so admits.

8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

The Employer, an Indiana corporation with an office and place of business located in Honolulu, Hawaii, is engaged in the retail sale of paint, glass, and related products. During the past 12 months Respondent's gross revenues exceeded $500,000, and it purchased materials and supplies in excess of $50,000 which originated outside the State of Hawaii.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in

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[3] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] Chairman Dotson did not participate in the underlying representation case.

commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

UFCW, Local 480, AFL--CIO, affiliated with United Food & Commercial Workers International Union, AFL--CIO--CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees of the Employer on the Island of Oahu; excluding glaziers, confidential employees, estimators and salesmen, guards, and supervisors as defined in the Act, as amended.

2. The certification

On 14 September 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 22 September 1982 and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about 12 October 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 25 October 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 25 October 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5)

defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 22 September 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 25 October 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders

and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. The O'Brien Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. UFCW, Local 480, AFL--CIO, affiliated with United Food & Commercial Workers International Union, AFL--CIO--CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees of the Employer on the Island of Oahu; excluding glaziers, confidential employees, estimators and salesmen, guards, and supervisors as

that the Respondent, The O'Brien Corporation, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with UFCW, Local 480, AFL--CIO, affiliated with United Food & Commercial Workers International Union, AFL--CIO--CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees of the Employer on the Island of Oahu; excluding glaziers, confidential employees, estimators and salesmen, guards, and supervisors as defined in the Act as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility at 770 Ala Moana Boulevard, Honolulu, Hawaii, copies of the attached notice marked

''Appendix.''[5] Copies of said notice, on forms provided by the Regional Director for Region 20 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. 26 August 1983

Donald L. Dotson, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with UFCW, Local 480, AFL--CIO, affiliated with United Food & Commercial Workers International Union, AFL--CIO--CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time employees of the Employer on the Island of Oahu; excluding glaziers, confidential employees, estimators and salesmen, guards, and supervisors as defined in the Act, as amended.

THE O'BRIEN CORPORATION

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 13018, P.O. Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415--556--0335.